Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASHLAND INC.,
Petitioner,
v.
REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the Commonwealth of Kentucky Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Kentucky's unapportioned imposition of use tax on the full amount of recurring lease payments for aircraft that are both used and stored, in part, outside of Kentucky violates the Constitution.

PARTIES AND AFFILIATED COMPANIES

All parties to the proceeding are listed in the caption. The following is a list of the non-wholly-owned subsidiaries of Ashland Inc.:

A.B. & H. Processing, Inc.
ACS Coal Sales Company, Inc.
Allegheny Land Company
Allegheny Land Company No. 2
Apogee Coal Co.
Arch Coal Sales Company, Inc.
Arch International, Inc.
Arch Mineral Corporation
Arch of Wyoming, Inc.
Ark Land Company
Ashland Coal International, Ltd.
Ashland Coal Sales (Ohio), Inc.
Ashland Coal, Inc.
Ashland Korea Foundry Products, Limited
Ashland Polymers Pty. Limited
Ashland Terminal, Inc.
Ashland-Avebene S.A.
Ashland-Bentonit Resinas Ltda.
Ashland-Sudchemie Giesserei-Chemikalien GMBH
Ashland-Sudchemie Kernfest GMBH
B.V. Ashland-Sudchemie V.H. Necof
Bebe Coal Corporation
Big Sandy Terminal, Inc.
Catenary Coal Company
Catenary Coal Holdings, Inc.
Coal-Mac, Inc.
Cumberland River Coal Company
Dal-Tex Coal Corporation
Donau Drew Handelsgesellschaft M.B.H.
Drennen Tipple Corporation
Drew Ameroid (M) Sdn. Bhd.
Drew Australia Pty. Ltd.
Drew New Zealand Limited
Energy Development Co.

Exaloid S.L.
Filbeth Enterprises, Inc.
Great Lakes Coal & Dock
Hobet Mining, Inc.
Hodogaya Ashland Co., Ltd.
Iberia Ashland Chemical S.A.
Julian Tipple, Inc.
Kernfest-Webac, A.B.
Lone Mountain Processing, Inc.
Mingo Logan Coal Company
Mountain Gem Land No. 2, Inc.
Mountain Gem Land, Inc.
Mountain Mining, Inc.
Mountaineer Land Company
Mountaineer Land Company No. 2
Old Hickory Coal Company
P.C. Holding, Inc.
R & H Service and Supply Co.
Saarcar Coal, Inc.
Servco, Inc.
Sharples Coal Corporation
Tri-State Terminals, Inc.
Tri-State Testing Co., Inc.
United States Coal Company
Webachem Oy

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PETITION FOR A WRIT OF CERTIORARI

Ashland Inc. petitions for a writ of certiorari to review the judgment of the Commonwealth of Kentucky Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals (Pet. App. 1a-7a) is reported at 888 S.W.2d 667. The order of the Kentucky Supreme Court denying discretionary review (Pet. App. 8a) is not yet reported. The opinion of the Kentucky Greenup Circuit Court (Pet. App. 9a-13a) is not reported. The opinion of the Kentucky Board of Tax Appeals (Pet. App. 14a-19a) is not reported.

JURISDICTION

The order of the Kentucky Supreme Court denying discretionary review was entered on January 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in pertinent part:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States . . . .

The Fourteenth Amendment (Due Process Clause) of the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Kentucky Revised Statutes § 139.310 provides in pertinent part:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

STATEMENT

1. As part of its continuing business operations, Ashland leases and operates a fleet of aircraft. The aircraft are based at a public airport in Kentucky, although the lease agreements were entered into and the aircraft were delivered and first used outside of Kentucky. The aircraft are flown primarily outside of Kentucky and spend a significant portion of their ground time being stored at airports in other states. Pet. App. 10a, 17a; Appellant's Trial Exhs. 1 & 2. The lease payments are made on an annual or monthly basis. Pet. App. 16a.

Kentucky imposes an excise tax "on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property." Ky. Rev. Stat. Ann. § 139.310 (Michie 1991). In 1985, Kentucky amended its statutory definitions of "purchase" and "sale" to include "lease or rental." *See* Ky. Rev. Stat. Ann. §§ 139.090, 139.120 (Michie 1991); 1985 Ky. Acts, Ch. 6 (Part III) §§ 6 and 7. The effect of that change was to expand the storage and use tax to include a recurring excise tax assessment on the gross *rentals* paid for tangible personal property rented from an out-of-state lessor for storage or use in Kentucky, as those rentals are paid on a periodic basis. Pet. App. 9a-10a, 14a; Tr. 44.

2. The Kentucky taxing authorities assessed use tax against Ashland on an unapportioned basis, imposing what was then a five percent tax on the full amount of the periodic lease payments made by Ashland for its aircraft. Ashland objected to the tax assessment on the ground that the failure to apportion was unconstitutional because Kentucky was taxing use and storage of the aircraft that occurred in other states. The Kentucky Board of Tax Appeals overruled Ashland's objections, stating only that "the assessment of tax at issue is constitutionally valid." Pet. App. 19a.

Ashland sought judicial review of the Board's decision, and the Greenup County Circuit Court reversed. Pet. App. 9a-13a. The court remarked that "[i]t is black letter law that an unapportioned tax on gross receipts derived from interstate commerce cannot stand." *Id.* at 11a-12a. The court held that the statute should be interpreted to provide for the imposition of the use tax on an apportioned basis, taking into account the flight time and the ground time of the aircraft in Kentucky. *Id.* at 12a-13a.

The Kentucky Revenue Cabinet appealed, and the Kentucky Court of Appeals reversed and ordered reinstatement of the decision of the Kentucky Board of Tax Appeals. Pet. App. 1a-7a. The court dismissed the apportionment objection by stating that no other state "has in fact taxed the leases at issue here or the use, storage or other consumption of the aircraft." *Id.* at 7a. The court also stated that there is "nothing in the record to lead us to believe that any other state would *now* have the requisite substantial nexus necessary to impose a tax." *Id.* (emphasis in original). The court concluded that there accordingly "has been no showing of the risk of multiple taxation that" the fair apportionment requirement "was designed to prevent." *Id.* Finally, the court stated that, if there were multiple taxation, Ashland "would then be entitled to a credit or exemption pursuant to KRS 139.510 as it is applied by the Cabinet." *Id.*[1]

REASONS FOR GRANTING THE PETITION

One of the most fundamental constitutional limitations on state taxation is the principle that a state may not extend its taxing power beyond its borders. The state must "exert[] its power *in proper proportion* to [the taxpayer's] activities within the State and to [the taxpayer's] consequent enjoyment of the opportunities and protections which the State has afforded." *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964) (emphasis added). Indeed, the taxation by one state of value or activities attributable to another state violates both the Commerce Clause and the Due Process Clause. "[T]he due process clause denies to the state power to tax or regulate the corporation's property and activities" outside its boundaries. *Connecticut General Life Ins. Co. v.*

[1] The court here was referring to the State's assertion in its brief that it would apply section 139.510 to provide a credit for use tax paid to another state in connection wtih the aircraft leases, even though the statute by its terms provides a credit only for *sales* taxes paid to another state.

Johnson, 303 U.S. 77, 80-81 (1938). And a tax violates the Commerce Clause unless "the State has taxed only that portion of the revenues from the interstate activity which reasonably reflect the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). In accordance with this territorial limitation, the Court has long recognized that, as a general rule, "an unapportioned tax . . . by its very nature makes interstate commerce bear more than its fair share." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462 (1959).

The decision below ignores this basic tenet of constitutional law in approving Kentucky's imposition of a recurring, unapportioned storage and use tax on 100 percent of the gross lease payments made for property that is used and stored, in part, outside of Kentucky. This Court should not permit this decision to stand—both because it is so fundamentally at odds with the basic restrictions on state taxation of interstate activity and because the issue is of potentially broad and recurring significance in the many other states that impose use taxes on leased property.

1. The framework for analyzing the constitutionality of state taxation of interstate activity is the familiar four-part analysis of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). To be constitutional, the tax must: (1) be applied to "an activity with a substantial nexus with the taxing State"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State." *Id.* at 279. This test incorporates requirements of both the Commerce Clause and the Due Process Clause. *See Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914 n.7 (1992); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 373 (1991).

Kentucky's unapportioned imposition of its use tax on the full value of Ashland's periodic lease payments fails

to satisfy this test. Indeed, although Kentucky plainly has enough of a nexus to impose some tax on Ashland's use of the aircraft, its failure to employ an apportionment mechanism to confine the incidence of the tax to in-state activity encroaches upon each of the other three elements of the standard formulation.

By its terms, the tax is "imposed on the storage [or] use" of the property in question. That activity being taxed, however, does not occur exclusively in Kentucky; it is undisputed that the airplanes are both stored and used outside of Kentucky for significant periods of time. *See* Appellant's Trial Exhs. 1 & 2. In these circumstances, the tax plainly cannot be "fairly apportioned" by apportioning to Kentucky 100 percent of the tax base. Kentucky is not limiting the incidence of its tax to in-state activity with which it has a nexus; the tax in part is being "imposed on the storage [or] use" of the airplanes in other states. *See, e.g., Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

Moreover, the effect of the failure to apportion the tax is that Ashland pays the same tax as would a similarly situated lessor who used and stored its leased planes exclusively within Kentucky. By imposing a greater proportional tax burden on Ashland in relation to its in-state activity, Kentucky's taxation scheme both discriminates against interstate commerce (*see American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 290-91 (1987)) and fails adequately to relate the tax to services provided by the State (*see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27 (1981)).

The fundamental problem with Kentucky's tax—namely, the taxation of out-of-state activity—has been addressed repeatedly by this Court in the context of a gross receipts tax. In *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), the Court ruled that the state of Washington could not measure its franchise tax on an in-state corporation by reference to the entire

gross receipts from its sales because that would tax activities attributable to other states. The Court explained that "the tax, measured by the entire volume of the interstate commerce in which [taxpayer] participates, is not apportioned to its activities within the state." *Id.* at 439. Similarly, the Court invalidated Indiana's unapportioned gross receipts tax on a domestic manufacturer that sold some of its products to customers in other states. *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938). The Court criticized the tax as "includ[ing] in its measure, without apportionment, receipts derived from activities in interstate commerce." *Id.* at 311.

This territorial limitation on state taxation is well illustrated by *Central Greyhound Lines, Inc. v. Mealey, supra.* In that case, New York imposed an unapportioned gross receipts tax on a bus company that transported passengers between points in New York, but over routes that used highways located in neighboring states. This Court held that, consistent with the Constitution, the tax could be imposed only on the amount attributable to the company's activity in the state, which required an apportionment based on the mileage travelled in the various states. The Court observed that "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" 334 U.S. at 663, quoting *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946). Accordingly, an unapportioned gross receipts tax is valid only where all the receipts are attributable to intrastate activity, in which case the tax is "'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 564 (1975), quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 440.

Kentucky's use tax is measured by the lessor's gross receipts from the rental of its aircraft to Ashland, but it

is not literally a "gross receipts tax" because it is imposed on the lessee, not the lessor. In essence, the tax is a "mirror image" of a gross receipts tax—one that is imposed on a continuing basis upon the activities of storage and use, rather than on an income stream.[2] Whatever technical difference exists between a gross receipts tax and the Kentucky tax on storage and use that is measured by gross rentals is irrelevant to its constitutionality. In either case, without apportionment the tax is impermissibly imposed on out-of-state activity—here, the storage and use of the leased aircraft in other states. *See also Norfolk & Western R. Co. v. State Tax Commission*, 390 U.S. 317, 325 (1968); *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952) (property taxes must be apportioned where the property is subject to taxation by more than one jurisdiction). Apportionment of the Kentucky tax is feasible (*cf. Goldberg v. Sweet*, 488 U.S. at 264-66) and required by the Constitution.

Kentucky's failure to apportion its storage and use tax violates not only the fair apportionment prong of *Complete Auto*, but also the fourth prong of that test—the requirement that the tax be "fairly related" to the services provided by the state. In *Commonwealth Edison Co. v. Montana, supra*, the taxpayer challenged Montana's coal severance tax on several grounds, including the allegation that the amount of the tax far exceeded the value of the services provided by the state. The Court emphatically rejected that contention, explaining that the fourth prong of *Complete Auto* is "closely connected to the first prong," in that it focuses on the nexus between the state and the activity being taxed. 453 U.S.

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[2] The Kentucky statute itself appears to treat the use tax as indistinguishable from a gross receipts tax—for example, describing amounts exempted from the computation of the tax in terms of "gross receipts." *See* Ky. Stat. Ann. § 139.470 (Michie 1991). Similarly, in its brief in the Kentucky Court of Appeals below (at 14), the state described the tax at issue here as imposed "upon the gross receipts from a lease or rental agreement."

at 626. The fourth prong establishes "that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Id.*, quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) (emphasis in original). Specifically, the tax must be "assessed in proportion to a taxpayer's activities or presence in a State." 453 U.S. at 627.

Montana's coal severance tax satisfied this standard because the activity being taxed, the mining of coal, occurred entirely in Montana. *Id.* at 626. But the situation is very different with respect to Kentucky's use tax. Ashland pays the same use tax, based on 100% of its gross rental payments, that it would if the storage and use of the leased aircraft were entirely intrastate; the tax does not vary at all with the level of in-state activity. The Kentucky use tax thus presents a classic example of the constitutional defect described by the Court in *Commonwealth Edison*: "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Id.* at 629.

In this respect, the tax here is closely analogous to the "flat taxes" on highway users struck down by this Court as discriminatory in *American Trucking Associations, Inc. v. Scheiner, supra.* Taxpayers who used both Pennsylvania highways and out-of-state highways paid precisely the same tax as taxpayers who used Pennsylvania highways exclusively. The Court explained that those taxes "discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State." 483 U.S. at 290. Because the amount of the tax "does not vary directly with miles traveled or with some other proxy for value obtained from the State,"

the Pennsylvania taxes failed the fourth prong of the *Complete Auto* test as explicated in *Commonwealth Edison*. *Id.* at 291.

The same is true of the Kentucky use tax as applied to gross rentals; taxpayers like Ashland who store and use their leased aircraft both inside and outside Kentucky pay precisely the same tax as taxpayers who store and use their leased aircraft exclusively within the state. The taxpayers engaged in interstate activity thus pay a higher per activity charge in Kentucky and therefore, like the interstate truckers in *American Trucking*, are unconstitutionally forced to pay tax disproportionate to the services they receive from the state.

2. The Kentucky Court of Appeals did not address these constitutional defects in the State's tax scheme. The court brushed off Ashland's claim with the blithe assertion that no other state has "the requisite substantial nexus necessary to impose a tax" and therefore "there has been no showing of the risk of multiple taxation that [the fair apportionment] prong of the *Complete Auto Transit* test was designed to prevent." Pet. App. 7a.

The court's assertion is unfounded. Although the leased aircraft are based in Kentucky, they spend considerable time being stored and used in other states. During that time, those states provide protection and other services to the aircraft, which gives them a sufficient nexus to tax Ashland on the storage and use of the aircraft. *See, e.g., Braniff Airways, Inc. v. Nebraska Bd. of Equalization*, 347 U.S. 590, 600-02 (1954); *Standard Oil Co. v. Peck*, 342 U.S. at 384. Moreover, even the Kentucky court did not dispute that a use tax could have been imposed by the state in which the leased airplanes were delivered and first used before they ever appeared in Kentucky. *See* Pet. App. 7a. There thus can be little doubt that Kentucky is not the only state with sufficient nexus to be able to tax Ashland's storage and use of leased aircraft, and therefore that Kentucky's taxation of

the rental payments on an unapportioned basis creates a risk of multiple taxation.[3]

The Kentucky Court of Appeals also stated that, if there were a risk of multiple taxation, Ashland "would then be entitled to a credit or exemption pursuant to KRS 139.510 as it is applied by the Cabinet." Pet. App. 7a. This creative interpretation of Kentucky's credit provision, which by its terms provides a credit only for taxes "substantially identical to the tax levied under KRS 139.200" (that is, sales taxes, not use taxes), does not cure the constitutional defect in Kentucky's unapportioned use tax.

First, the credit found by the court below does not even have the claimed effect of preventing multiple taxation. Kentucky's credit is conditioned on reciprocity; no credit will be given for tax paid to another state "if that state does not grant credit for sales taxes paid in this state." Therefore, regardless of how broadly its credit provision is construed, Kentucky will subject taxpayers to multiple taxation if they pay a second use tax to a state that does not grant a credit for Kentucky taxes.

More fundamentally, the Kentucky court erred because "multiple taxation" is not the only, or most significant, constitutional problem with its unapportioned tax. The core defect is that Kentucky is taxing out-of-state activity, and a credit mechanism does nothing to address that defect. If one state, for whatever reason, does not tax in-state activities, a second state is not free to "fill the gap" and tax the activity through the expedient of saying that it will give a credit for taxes paid to another state. For example, if New Hampshire chooses not to

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[3] That risk is not merely theoretical. Most states impose a use tax on the lease or rental of tangible personal property. *See* William A. Raabe & Karen J. Boucher, *1998 Multistate Corporate Tax Guide*, Vol. II, at 311-17.

have an income tax, Vermont cannot tax income attributable to New Hampshire, even if it affords a credit. *See Goldberg v. Sweet*, 488 U.S. at 270 n.3 (Stevens, J., concurring) ("That one state through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share."); *Northwest Airlines, Inc. v. Minnesota*, 332 U.S. 292, 326 (1944) (Stone, C.J., dissenting) ("The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do.").[4]

The same principle applies here. As explained in point 1, Kentucky has violated the territorial limitations of the Commerce and Due Process Clauses in imposing a tax on the storage and use of leased aircraft in another state. Asserting that it will grant a credit cannot operate to extend the reach of Kentucky's taxing power to cover activity beyond its borders.

3. This Court's recent decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995), addresses an issue related to the one presented here, and the Court's opinion further demonstrates the error by the Kentucky court below. In *Jefferson*, the Court upheld Oklahoma's imposition of an unapportioned sales tax on the purchase price of a ticket for interstate bus transportation. The Court ruled that the special character of sales taxes relieves them from the apportionment requirement that attaches to most other taxes—like gross receipts, property, or taxes on activities.

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[4] The Court has effectively overruled the holding of *Northwest Airlines* in favor of "a rule of fair apportionment among the States." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 442 (1979). The Court has treated Chief Justice Stone's dissenting opinion in *Northwest Airlines* as an accurate statement of current Commerce Clause doctrine. *Id.* at 443, 452 n.17, 455.

The Court emphasized that a sale is a "discrete event" (slip op. 11) that is consummated at one time and "properly treated as unique" (*id.* at 13). A sale entails "agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.* at 15. Therefore, a sales tax does not present the same "opportunit[y] . . . for multiple taxation of the same taxpayer" that is present in the case of other kinds of taxes. *Id.* at 14-15. The Court concluded that Oklahoma's unapportioned sales tax is constitutional because it "reach[es] only the activity taking place within the taxing State, that is, the sale of the service." *Id.* at 21-22.

The holding of *Jefferson* has no bearing on this case. Kentucky's tax is not a sales tax, nor is it imposed on any other "discrete event." It is a recurring charge, not a one-time assessment, that is imposed on a continuing basis on the activity of storage and use of leased property —activity that undeniably occurs in many states other than Kentucky. Indeed, the analysis of *Jefferson* confirms that the Kentucky use tax must be apportioned. Because the tax does not "reach[] only the activity taking place within" Kentucky, it fails the standard of "external consistency" set forth in *Jefferson*. *Id.* at 21-22.

Moreover, the *Jefferson* decision confirms that Kentucky's tax cannot be reconciled with the discrimination prohibition elucidated in *American Trucking Association v. Scheiner*, *supra*. The Court distinguished *Scheiner* because the Oklahoma sales tax was "imposed not upon the use of the State's roads, but upon" the sale event. *Id.* at 24. In this case, however, the tax by its terms is imposed upon the storage and use of the property, activities that necessarily invoke the protections of the state in which they occur. Although mileage was not "a relevant proxy" (*id.*) for the state-conferred benefits associated with the sale in *Jefferson*, here the level of storage and use in Kentucky is "a relevant proxy" for the benefits

conferred by the state in connection with the storage and use of the aircraft.

Finally, the Court in *Jefferson* reconfirmed that the fourth prong of *Complete Auto* turns on whether the measure of the tax varies with the level of activity in the state, as set forth in *Commonwealth Edison v. Montana*, 453 U.S. at 626-29. In *Jefferson*, that prong was satisfied because the "sale . . . takes place wholly inside Oklahoma." *Id.* at 25. In this case, by contrast, much of the taxable activity takes place outside of Kentucky, but the state measures the tax as if all the activity occurred within the state.

Because the court below did not have the benefit of this Court's most recent exposition of the relevant principles in the *Jefferson* decision, the Court may wish to consider vacating and remanding this case for reconsideration in light of *Jefferson*.

4. The issue presented here warrants review by this Court. As noted earlier (at 11 n.3), most states have statutes that impose a tax on the storage and use of leased tangible personal property like aircraft. If the decision of the Kentucky Court of Appeals is permitted to stand, it will set a precedent that likely would lead at least some of these states also to apply their use taxes in an unconstitutional manner. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 439.

Although we are not aware of any other state court to consider the precise issue presented here, the lower court's approval of Kentucky's unapportioned taxation of periodic lease payments is at odds with decisions in other states that recognize the need for apportionment of recurring taxes that extend to out-of-state activities. The California Supreme Court's decision in *Flying Tiger Line, Inc. v. County of Los Angeles*, 333 P.2d 323, 51 Cal. 2d

314 (1958), *cert. denied*, 359 U.S. 1001 (1959), is instructive. In that case, the county sought to impose an unapportioned property tax on planes permanently based in California but regularly flown in interstate and foreign commerce. The California court held the tax assessment unconstitutional, explaining that the owner was "entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state." 333 P.2d at 326, 51 Cal. 2d at 319. Notably, with respect to planes that were *leased*, the county acknowledged from the outset that the tax had to be apportioned. *See* 333 P.2d at 324, 51 Cal. 2d at 316. The contrast between California's and Kentucky's view of apportionment reflects a level of disarray among state courts on this important issue that will only increase if this Court allows the erroneous decision below to stand.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider vacating the judgment below and remanding for reconsideration in light of its decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995).

Respectfully submitted,

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